SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 677

HORACE A. YOUNG, BETTY JEAN GILBERT AND PATSY MARIE GILBERT, MINORS, BY HON. EMMA MATTHEWS GILBERT, THEIR MOTHER AND NEXT FRIEND; CORBIN DEMUKES AND CARALIENE DEMUKES ROBERTS,

Petitioners,

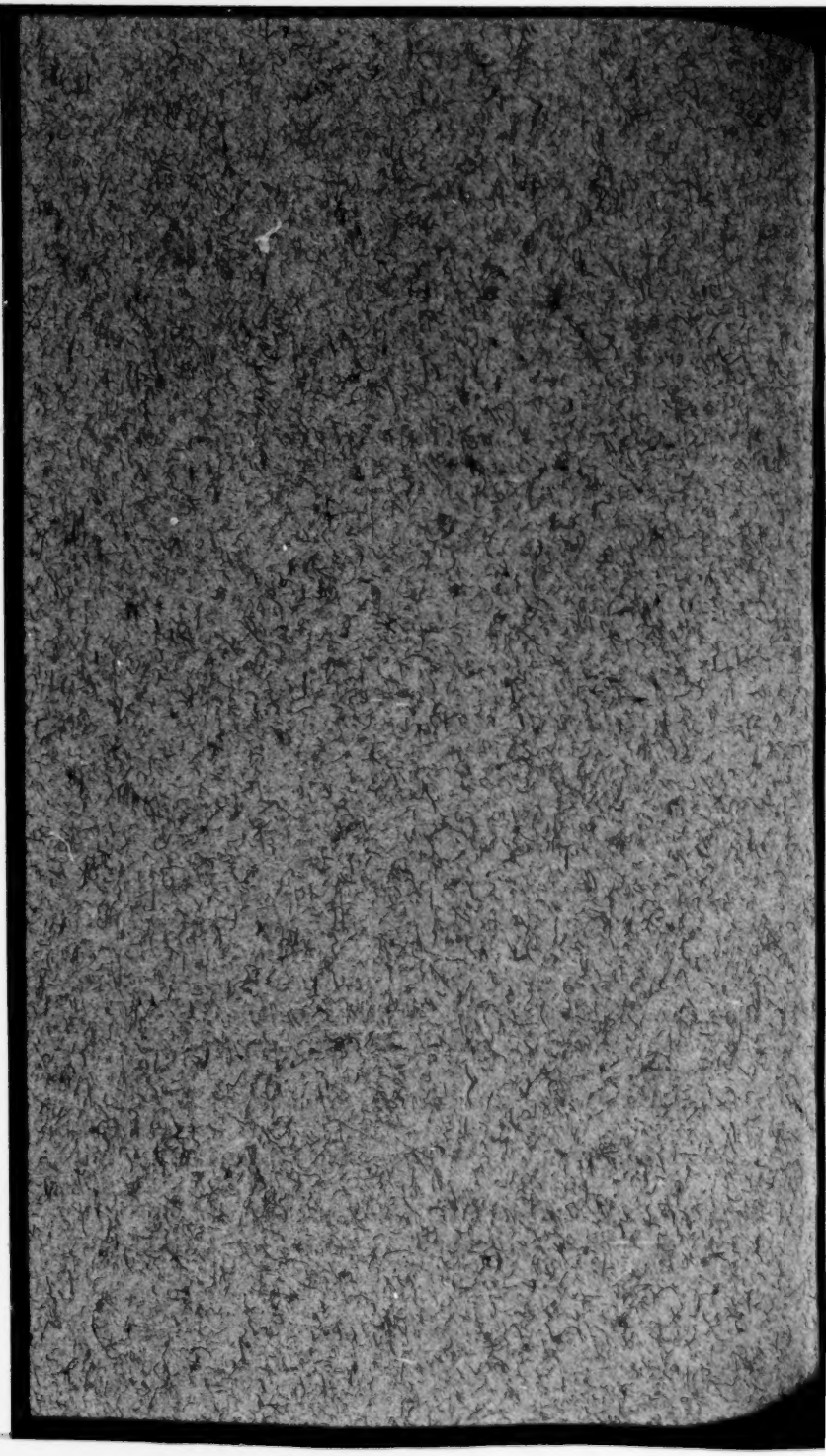
vs.

ASA C. GARRETT, FRANK GARRETT, E. S. FOSTER, MID-CONTINENT PETROLEUM COPORATION AND THE CARTER OIL COMPANY, A Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS, AND BRIEF IN SUPPORT THEREOF.

C. E. WRIGHT,
HENRY B. WHITLEY,
DUVAL L. PORTER,
WILSON and KINSEL,
Counsel for Petitioners.



INDEX

Subject Index

Authorities

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 834

HORACE A. YOUNG, BETTY JEAN GILBERT AND PATSY MARIE GILBERT, MINORS, BY MRS. EDNA MATTHEWS GILBERT, THEIR TUTRIX AND AS NEXT FRIEND; CORBIN DISMUKES AND GARALDINE DISMUKES ROBERTS, *Petitioners,*

vs.

ASA C. GARRETT, FRANK GARRETT, R. S. FOSTER, MID-CONTINENT PETROLEUM COPORATION AND THE CARTER OIL COMPANY, A CORPORATION, *Respondents*

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of Horace A. Young, Betty Jean Gilbert and Patsy Marie Gilbert, minors, by Mrs. Edna Matthews Gilbert, their tutrix and as next friend; Corbin Dismukes and Garaldine Dismukes Roberts, respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

Petitioners herein, plaintiffs in the state courts, are attempting to obtain trial of their cause of action on its merits. In all of the proceedings in the Federal Court and in the state courts, there has been no trial on the merits of peti-

tioners' cause of action. Valuable property of petitioners has been appropriated by persons having no lawful claim thereto and petitioners have been refused their right to a trial on the merits of this case. Petitioners have not been guity of laches or neglect. Their cause of action, *i. e.*, their right to the property, was acquired upon the death of Mary Christine Pace, non compos mentis, on December 27, 1939. Petitioners first brought action on this cause December 26, 1941, not quite two years after accrual of their cause of action. From the date of filing of the original suit in 1941 until this date, petitioners have continuously and vigorously pursued their remedy in the federal and state courts.

A chronological table of the efforts to litigate this matter will, we believe, be of help to the court in understanding just what issue is before it.

December 26, 1941—The Gilberts brought an action in the U. S. District Court for the Western District of Arkansas, El Dorado Division, against appellees, in which Horace A. Young intervened.

December 24, 1942—Action by Horace A. Young et al. against appellees brought in the U. S. District Court for the Western District of Arkansas, El Dorado Division. This action was brought because it was realized that the intervention of Horace A. Young in the suit by the Gilberts was an error.

April 14, 1943—Original action started December 26, 1941, in which Horace A. Young was intervener, dismissed for lack of jurisdiction.

September 14, 1943—Action begun on December 24, 1942 by Horace A. Young et al. dismissed for lack of jurisdiction.

May 9, 1945—*Young* v. *Garrett* affirmed by Circuit Court of Appeals.

August 8, 1945—Rehearing denied and case remanded to U. S. District Court with orders to permit appellees to

apply for leave to amend for the purpose of stating jurisdiction.

February 28, 1946—District Court denied appellants' motion to amend, thus exhausting the last suggestion for relief by the Circuit Court of Appeals.

September 19, 1946—Appellants, Horace A. Young et al., brought present action in Columbia Chancery Court.

February 25, 1947—Circuit Court of Appeals affirmed District Court's actions in denying appellants' motion to amend.

March 12, 1947—Columbia Chancery Court dismissed plaintiffs' complaint, holding as its reason for so doing that the action was barred by the one-year limitation as to new suits after nonsuit as contained in Section 8947 of Pope's Digest.

January 19, 1948—The Supreme Court of Arkansas affirmed the Columbia Chancery Court and applied Rule 60B of the Federal Rules of Civil Procedure to the interpretation of the Arkansas statute digested in Section 8947 of Pope's Digest.

March 1, 1948—Supreme Court of Arkansas denied petitioners' petition for rehearing.

The matter in the state court, which was determined so disastrously for petitioners, was, in fact, a federal question and should, we believe, alone be sufficient to give this Court jurisdiction. That issue was a question as to when the nonsuit in Federal court should be held to have been suffered. If it was suffered within one year before the bringing of the action in the State court, then, under the provisions of Section 8947 of Pope's Digest of the Statutes of Arkansas, the action in the state court was proper and within the period of limitations and the rulings of the Chancery Court of Columbia County, Arkansas and of the Supreme Court of Arkansas were wrong and violated several clauses of the Federal Constitution, to be later discussed in detail.

B

Reasons Relied upon for the Allowance of the Writ

1. The State courts, in effect, wrongly determined that the order of August 8, 1945, by the U. S. Circuit Court of Appeals for the 8th Judicial Circuit, denying rehearing of the appeal in *Young et al.* v. *Garrett et al.* and remanding the case to the U. S. District Court with orders to permit appellees to apply for leave to amend for the purposes of stating jurisdiction, was a final order allowing no further proceedings in the Federal courts and constituted, as of August 8, 1945, a nonsuit in Federal court. The very important question as to when the nonsuit was suffered in Federal Court is a matter proper for determination by the Supreme Court of the United States and when wrongly determined by the State court, is a proper matter for invocation of the remedy of certiorari.

2. In ignoring the portion of the order, dated August 8, 1945, of the U. S. Circuit Court of Appeals for the 8th Judicial Circuit wherein the court remanded the case to the District Court with orders to permit appellees to apply for leave to amend their complaint for the purpose of stating jurisdiction, the Chancery Court of Columbia County, Arkansas, and the Supreme Court of Arkansas failed and refused to give full faith and credit to the order of that court, which constituted a violation of Article IV, Section 1 of the Federal Constitution.

3. The Supreme Court of Arkansas, in its opinion affirming the decree in the Columbia Chancery Court, based its findings on its interpretation of Rule 60B of the Federal Rules of Civil Procedure and its application of that rule to the interpretation of a state statute (Section 8947 of Pope's Digest). For this reason the decision of the Arkansas Supreme Court constitutes a violation of the por-

tion of the Federal Constitution providing for delegation of powers to the federal government and reservation of powers to the state governments. In addition, such use of this rule extends the provisions of the Federal Rules of Civil Procedure beyond the specific limitation placed thereon by the statute (28 U. S. C. A. Sec. 723(b)) authorizing the promulgation of the rules.

4. The question presented to the Supreme Court of Arkansas by the appeal perfected by petitioners herein posed one major problem for determination by the Supreme Court of Arkansas; i.e., "When was the nonsuit in Federal Court suffered?" If the nonsuit in Federal Court was suffered less than one year prior to bringing of the action in the state court, the state court action could not be barred by limitation by reason of Section 8947 of Pope's Digest of the Statutes of Arkansas. Despite the fact that this was the basic problem presented to the Supreme Court of Arkansas, that court refused to determine the issue and affirmed the judgment of the lower court without determination of the only issue which could have warranted an affirmation, and, by this action, it deprived petitioners of their property without due process of law, in violation of Amendment XIV to the Federal Constitution.

5. The Chancery Court of Columbia County, Arkansas, and the Supreme Court of Arkansas both refused to determine the status of the claim of Patsy Marie Gibert and Betty Jean Gilbert, minors, but, instead, denied them the right, guaranteed under the laws of Arkansas, to prosecute their claim at any time within three years after they become of age, such denial having the effect of taking from them their property without due process of law, in violation of Amendment XIV to the Federal Constitution.

6. The decision of the Supreme Court of the State of Arkansas rendered January 19, 1948 overlooks a funda-

mental principle of law and deprives the appellants of the right to their property without due process of law and in violation of Amendment XIV to the Federal Constitution, in that it denies to petitioners the benefits of the nonsuit statute as digested in Section 8947 of Pope's Digest.

Wherefore, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Arkansas, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 8290, Horace A. Young et al., Appellants, vs. Levi Garrett et al, Appellees, and that the said judgments of the Chancery Court of Columbia County, Arkansas, and the Supreme Court of Arkansas may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

HORACE A. YOUNG,
BETTY JEAN GILBERT and
PATSY MARIE GILBERT, *minors,*
by Mrs. Edna Matthews Gilbert,
their tutrix and as next friend.
CORBIN DISMUKES,
GARALDINE DISMUKES ROBERTS,
Petitioners.

By C. E. WRIGHT,
HENRY B. WHITLEY,
DUVAL L. PURKINS,
WILSON & KIMPEL,
Counsel for Petitioners.
per: .....

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 834

HORACE A. YOUNG; BETTY JEAN GILBERT AND PATSY MARIE GILBERT, MINORS, BY MRS. EDNA MATTHEWS GILBERT, THEIR TUTRIX AND AS NEXT FRIEND; CORBIN DISMUKES AND GARALDINE DISMUKES ROBERTS, *Petitioners,*

vs.

ASA C. GARRETT, FRANK GARRETT, R. S. FOSTER, MID-CONTINENT PETROLEUM CORPORATION AND THE CARTER OIL COMPANY, A CORPORATION, *Respondents*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinion of the Court Below

The opinion of the Supreme Court of Arkansas, dated January 19, 1948, has not been officially reported at this time. The opinion appeared in The Law Reporter, Vol. 87, page 585.

II

Jurisdiction

1. Petition for Rehearing was denied by the Supreme Court of Arkansas on March 1, 1948.

2. As grounds for the jurisdiction of the Supreme Court of the U. S., petitioners rely upon six points, which, stated briefly, are as follows:

(1) Failure of the state courts to properly determine when the nonsuit in Federal Court was suffered; (2) Failure of the state courts to give full faith and credit to the decree of the U. S. Circuit Court of Appeals; (3) Application by the Supreme Court of Arkansas of Rule 60B to the interpretation of a state statute, thus extending the application of the rule beyond the power delegated to the Federal Government under the Constitution, and specifically extending the application of the rule beyond the limitations placed thereon by the statute authorizing promulgation of the rules; (4) Affirmance by the Supreme Court of Arkansas of the opinion of the lower court, although refusing to determine the issues involved, thus, taking from petitioners the right of review guaranteed them under the Constitution and laws of Arkansas, which constituted taking their property without due process of law; (5) Refusal of the state courts to determine the status of the claim of the minors involved in this litigation and foreclosing their rights without a trial on the merits thereof, as guaranteed to minors under the Constitution and laws of Arkansas, said action constituting taking their property without due process of law in violation of the Federal Constitution; and (6) Refusal of the state courts to grant petitioners equal protection under the laws of Arkansas and taking their property without due process of law in violation of the Federal Constitution in that the decision denies to petitioners the benefit of the Arkansas nonsuit statute.

The points relied on above were urged in the state courts as soon as they arose. Points 1, 5 and 6 were all urged in the Columbia Chancery Court. Points 2, 3 and 4 did not arise until the Supreme Court of Arkansas rendered its

decision. In the petition for rehearing filed by petitioners herein, the petitioners relied upon *all* of the above stated constitutional grounds and seriously contended that they be granted a rehearing of their cause in order that the above constitutional issues could be settled. This petition for rehearing was denied and overruled without comment on March 1, 1948.

3. Jurisdiction of this court is invoked under the authority of Section 237 of the Judicial Code as amended, Sub-Paragraph B, on the following grounds:

(a) As to petitioners' first and second bases for their petition for Writ of Certiorari, the Supreme Court of Arkansas denied full force and effect to the decree, dated August 8, 1945, of the U. S. Circuit Court of Appeals, 8th Judicial Circuit, and thereby violated Article IV, Section 1 of the Federal Constitution.

(b) As to petitioners' third basis for their petition for Writ of Certiorari, the opinion of the Supreme Court of Arkansas affirming the decision of the Chancery Court of Columbia County, Arkansas, constituted a violation of that portion of the Federal Constitution delegating to the Federal Government certain powers and reserving to the state government certain powers, in that it invoked a rule of federal procedure in interpretation of a state statute and placed upon the federal statute an interpretation which, if proper, would render said statute unconstitutional as an encroachment by the federal government upon powers reserved to the states.

(c) As to the petitioners' bases No. 4, 5, and 6 for their petition for Writ of Certiorari, the decree of the Chancery Court of Columbia County, Arkansas, and its affirmation by the Supreme Court of Arkansas constituted a violation of Amendment XIV to the Federal Constitution, in that

said decree and affirmation deprived petitioners of their property without due process of law.

It is specifically set up and claimed by petitioners that their rights, titled or privileged, under the Constitution of the United States as set forth in Article IV, Section 1 and Amendment XIV thereof, have been violated, and that said rights have been violated by the actions of the Chancery Court of Columbia County, Arkansas and the Supreme Court of Arkansas.

4. It is believed that the following cases sustain the jurisdiction of this court:

Baltimore & Ohio Railroad Co. v. *Maryland,* 22 L. Ed. 446, 20 Wall. 643;

Iowa-Des Moines National Bank v. *Bennett,* 76 L. Ed. 265, 284 U. S. 239;

Miedreich v. *Lauenstein,* 58 L. Ed. 584, 232 U. S. 236;

Nutt v. *Knut,* 50 L. Ed. 348, 200 U. S. 12;

Radio Station WOW, Inc., et al. v. *Johnson,* 89 L. Ed. 2092, 326 U. S. 120;

Rogers v. *Hennepin,* 60 L. Ed. 594, 597, 240 U. S. 184;

West Side Belt Railroad Co. v. *Pittsburgh Constr. Co.,* 55 L. Ed. 107, 110, 219 U. S. 92.

III

Statement of the Case

NOTE: A full statement of the case has been given under heading "A" in the Petition for Writ of Certiorari herein, and in the interest of brevity the statement will not be repeated under this point.

IV

Specification of Errors

1. The Chancery Court of Columbia County, Arkansas and the Supreme Court of Arkansas erred in determining,

in effect, that the order of August 8, 1945 of the U. S. Circuit Court of Appeals for the 8th Judicial Circuit was a final order, completing plaintiffs' remedy in the Federal courts and constituting a nonsuit. In so doing, these courts denied any effect to the portion of that order remanding the case to the U. S. District Court with orders to permit appellees to apply for leave to amend their complaint for the purpose of stating jurisdiction, thereby denying full faith and credit to the order of the U. S. Circuit Court of Appeals for the 8th Judicial Circuit, in violation of the Federal Constitution.

2. The Supreme Court of Arkansas erred in using Rule 60B of the Federal Rules of Civil Procedure to limit the remedial effect of the Arkansas statute digested in Section 8947 of Pope's Digest of the Statutes of Arkansas, thus violating the portion of the Federal Constitution providing for the separation of the powers of the state and federal governments.

3. The Supreme Court of Arkansas erred in extending the application of Rule 60B of the Federal Rules of Civil Procedure beyond the specific limitations placed thereon by the statute authorizing promulgation of the rules.

4. The Supreme Court of Arkansas refused to determine the only real issue before it when it refused to determine when the nonsuit in Federal Court was suffered, and by affirming the judgment of the lower court without determining this issue, it deprived plaintiffs of their property without due process of law.

5. The Chancery Court of Columbia County, Arkansas and the Supreme Court of Arkansas erred in refusing to consider the rights of the minors, Patsy Marie Gilbert and Betty Jean Gilbert, which rights were protected under the laws of Arkansas, and, by foreclosing their rights without determination thereof, these courts deprived the minors,

Patsy Marie Gilbert and Betty Jean Gilbert, of their property without due process of law.

6. The Chancery Court of Columbia County, Arkansas and the Supreme Court of Arkansas erred in denying plaintiffs the equal protection of the laws of the State of Arkansas in that it denied them the benefit of the Arkansas nonsuit statute as digested in Section 8947 of Pope's Digest.

V

ARGUMENT

Summary of Argument

POINT A. THE NONSUIT SUFFERED IN FEDERAL COURT WAS NOT SUFFERED ON AUGUST 8, 1945.

POINT B. RULE 60B OF THE FEDERAL RULES OF CIVIL PROCEDURE SHOULD NOT HAVE BEEN USED IN THE INTERPRETATION OF A STATE STATUTE.

POINT C. VIOLATION OF THE "DUE PROCESS OF LAW" CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

Point A

The Nonsuit in Federal Court

The Arkansas nonsuit statute provides:

> "If any action shall be commenced within the time respectively prescribed in this act, and the plaintiff therein suffer a nonsuit, or after a verdict for him the judgment be arrested, or after judgment for him the same be reversed on appeal or writ of error, such plaintiff may commence a new action within one year after such nonsuit suffered or judgment arrested or reversed (a). Provided, if after judgment for plaintiff the same be reversed on appeal or writ of error, and said cause is remanded for another trial, the mandate shall be taken out and filed in the court from which the appeal is taken, within one year from rendition of the judgment of reversal; otherwise said cause shall be

forever barred; and if the cause of such action survive to his heirs or survive to his executors or administrators, they may in like manner commence a new action or take out a mandate within the time allowed such plaintiff." (Section 8947 of Pope's Digest of the Statutes of Arkansas.)

This statute has been held by the state court to be remedial in nature. *Love* v. *Cahn,* 124 S. W. 259, 93 Ark. 215; *Dressler* v. *Carpenter,* 155 S. W. 108, 107 Ark. 353; *State Bank* v. *Magness,* 11 Ark. 343.

In the case of *State Bank* v. *Magness, supra,* the Supreme Court of Arkansas, in determining the purpose of the nonsuit statute, stated:

> "It is quite apparent that the intention of the framers of the Act (Act 159 of Acts of Arkansas, 1891, said act being digested in Section 8947 of Pope's Digest) was to secure that class of suitors from loss who, from causes incident to the administration of the law, are compelled to abandon their present action, whether by their own act or the act of the court, when either would leave them a cause of action yet undetermined, by giving them a reasonable time in which to renew such action. . . . The remedy was evidently intended to be co-extensive with the evil, and will be so held, unless some sensible reason to the contrary can be shown."

A nonsuit cannot be deemed to have been suffered until a final adjudication of the action. Thus, the nonsuit in the Federal Court in the case at bar would not have been deemed to have been suffered on September 14, 1943 when the District Court dismissed the case for lack of jurisdiction, for there was yet a further adjudication to be had. This adjudication was had by an appeal to the Circuit Court of Appeals on this case. On May 9, 1945 the decision was affirmed by the Circuit Court of Appeals, but this did not end plaintiffs' remedy in Federal Court. Plaintiffs then

filed a petition for rehearing in the Circuit Court of Appeals and on August 8, 1945, this petition for rehearing was denied, *but* the Circuit Court of Appeals, instead of completing its proceedings by a final order, remanded the case to the U. S. District Court with orders to permit appellees to apply for leave to amend for the purpose of stating jurisdiction.

That the Circuit Court of Appeals had authority to remand the case to the lower court is beyond question. In 3 Am. Jur. 679, Section 1169 (Appeal and Error) it is said:

> "• • • the appellate court may, upon affirming a judgment, terminate the litigation by entering final judgment. On the other hand, in cases where the ends of justice would be promoted, the courts generally have power to remand the cause for further proceedings."

This, then, was not the *final* adjudication of plaintiffs' rights in Federal Court. It was not until February 28, 1946, at which time District Court denied appellants' motion to amend, that the door was closed in plaintiffs' faces. Indeed, it might be said that it was not until February 25, 1947, when the Circuit Court of Appeals affirmed the District Court's order denying appellants' motion to amend, that the nonsuit was actually suffered; but in all events, in view of the subsequent litigation, all of which arose out of the order of the Circuit Court of Appeals remanding the case to the District Court, surely, it cannot be said that the nonsuit was suffered August 8, 1945.

To hold that the nonsuit was suffered on August 8, 1945 would, in effect, deny validity of the order of the Circuit Court of Appeals remanding the case. Such a holding would penalize plaintiffs for proceeding as they were directed to proceed by the Circuit Court of Appeals and would destroy the confidence of the public in the orders of such courts.

The ruling by the state courts constituted a violation of the full faith and credit clause of the Federal Constitution.

This issue was properly raised in the Chancery Court of Columbia County, Arkansas in the plaintiffs' amended and substituted complaint in equity (R. 40 et seq). The issue was wrongly determined by the Columbia Chancery Court when it stated:

> "The court is of the opinion and finds that the order of the U. S. Circuit Court of Appeals entered by that court on the 8th day of August, 1945 was a final order by that court * * *" (R. 65).
>
> "As before stated, this court finds as a matter of law, that the one year statute (nonsuit statute) began to run from the 8th day of August, 1945 * * *" (R. 65).

The Supreme Court of Arkansas, in effect, adopted the same interpretation, and thus became a party to the denial of full faith and credit to the portion of the order of the Circuit Court of Appeals remanding the case to the District Court, when it affirmed the lower court's opinion. (R. 68 et seq.) Although the Supreme Court of Arkansas did not specifically determine this issue, it must be held to have done so, inasmuch as the only reasonable interpretation of the affirmance by it of the lower court's decree would necessarily be on the ground that the nonsuit was suffered August 8, 1945. The court, in refusing to rule on this issue, stated:

> "If (the decision of the U. S. Court of Appeals on August 8, 1945 is) treated as a nonsuit—an issue we do not decide—more than a year elapsed before the Chancery suit was filed in September of the following year." (R. 73.)

This error on the part of the state courts and the consequent constitutional issue was pointed out to the Supreme Court of Arkansas in Petitioners' petition for rehearing and brief, but it was ignored. The point, however, was discussed by the Supreme Court and although the court spe-

cifically stated that it made no determination, it did recognize the problem and the effect of its decision was a denial on this ground. Inasmuch as the point was discussed and, for all purposes, decided by the State Supreme Court, under the authority of *Miedreich* v. *Lauenstein,* 58 L. Ed. 584, 232 U. S. 236, it cannot now be denied that the Federal question was properly raised.

POINT B

Use of Federal Rules of Civil Procedure in Interpretation of the State Statutes

This point, as a constitutional ground and a ground for federal jurisdiction, was not in issue until the Supreme Court rendered its opinion in the case of *Young et al.* v. *Garrett et al.* on January 19, 1948. Petitioners, in their petition for rehearing and brief, urged that the Supreme Court of Arkansas had committed an error that constituted a violation of the Federal Constitution, and that, in addition, they had extended the effect of the federal statute promulgating the Federal Rules of Civil Procedure beyond the limitations contained in the statute itself. Petitioners' contentions, however, were ignored and their petition for rehearing was denied without opinion. Under such circumstances, the issue was raised in due time, for it was raised as soon as the error was committed and the constitutional question arose. (*Radio Station WOW, Inc., et al.* v. *Johnson,* 89 L. Ed. 2092, 326 U. S. 120 (Headnote 4)).

In its decision, the Supreme Court discussed at length Rule 60B of the Federal Rules of Civil Procedure, and applied this rule to the case at bar as a criterion for determining whether the appellants were entitled to the benefits of the statute digested in Section 8947 of Pope's Digest. It was the court's opinion that this federal rule effectively precluded application of that section in the case at bar, and

that, because of Rule 60B, appellants were not entitled to a trial on the merits of the case.

The Federal Rules of Civil Procedure were promulgated pursuant to an act of Congress effective in 1934, which act is codified under Title 28, U. S. C. A., Section 723B. This statute states specifically that:

> "Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant."

The rules are, as stated in the act:

> "* * * for the District Courts of the United States and for the courts of the District of Columbia * * *."

These rules are not applicable to state courts and can have no effect whatever in interpretation or limitation of a state statute. Under our constitutional form of government, the legislative powers of the government are divided into two spheres: (1) that delegated to the Federal Government, as set out in the Constitution, and in the statutes enacted by the Congress of the United States, when constitutional, and (2) that reserved to the states. These rules of civil procedure are neither a part of the Constitution nor do they have statutory effect insofar as they affect laws of the states. The Supreme Court of Arkansas, in its decision handed down on January 19, 1948, determined that Rule 60B of the Federal Rules of Civil Procedure limited the application of the Act of April, 1891, p. 280, which is the act digested in Section 8947 of Pope's Digest, insofar as that statute is applicable to nonsuits suffered in Federal Court.

On page 374 of Title 28, U. S. C. A., it is stated:

> "These rules (the Federal Rules of Civil Procedure) are applicable only to proceedings in federal courts, and cannot be applied to practice or procedure in state courts, *nor affect rights of parties in such courts.*" (*Rader* v. *Baltimore & O. R. Co.*, C. C. A. Ill. 1940, 108

F. (2d) 980, certiorari denied, *Baltimore & O. R. Co.* v. *Rader*, 1940, 60 S. Ct. 722, 309 U. S. 682, 84 L. Ed. 1026). (Italics ours.)

The interpretation which the Supreme Court of Arkansas has placed on Rule 60B of the Federal Rules of Civil Procedure in its decision in the case at bar has the effect of denying petitioners a right to a trial on the merits of their case, in direct contravention of a statute of the State of Arkansas granting them the right to such a trial. In other words, the effect of the Arkansas Supreme Court's decision is to construe the federal rules as a limitation to the liberal remedial effects of the state statute (Section 8947 of Pope's Digest). In addition to being contrary to the Federal Statute authorizing promulgation of the rules, such an interpretation violates the very purpose for which the rules were designed. The court's attention is directed to several citations found in 28 U. S. C. A. pages 372-375 in which Federal Courts have determined the purpose of the rules:

"The purpose of the new procedure has been to throw into discard the technicalities that acted as a brake on the progress of a lawsuit; to abolish what has been so aptly termed as 'the sporting theory of justice; to provide efficient machinery for the ascertainment of truth; *and to expedite a termination of each controversy on the merits.*' Alexander Holtzoff, Special Assistant to the Attorney General, 26 A. B. A. Jour. 45." (Italics ours.)

"The purpose of the Federal Rules of Civil Procedure is to cut through the maze of technicalities which have heretofore existed, *and to enable the court to do a greater measure of moral justice under the law. Mackerer* v. *New York Cen. R. Co.*, D. C., N. Y. 1940, 1 F. R. D. 408." (Italics ours.)

"These rules are intended to liberalize procedure and *to avoid harshness of old rules requiring court to decline consideration of the merits because of neglect to com-*

ply with the rules. Burke v. *Canfield,* App. D. C. 1940, 111 F. (2d) 526." (Italics ours.)

"Liberality rather than restriction of interpretation should be the guiding rule in applying these rules. *Chemo-Mechanical Water Improvement Co.* v. *City of Milwaukee,* D. C. Wis. 1939, 29 F. Supp. 45."

In making use of this Federal Rule of Civil Procedure in the interpretation of the state statute, the Supreme Court of Arkansas violated that portion of the Federal Constitution providing for separation of powers between the state and federal governments, for it limited the application of a remedial statute passed by the Legislature of Arkansas (Section 8947 of Pope's Digest) by its interpretation of Rule 60B of the Federal Rules of Civil Procedure. It is a well recognized principle of our federal form of government that those powers not expressly delegated to the Federal Government and not granted to it by necessary implication, are reserved to the state governments. (*Constitution of the United States of America,* Revised and Annotated, Senate Document 232, 74th Congress, 2nd Session, pages 60, 61). The power to pass and enforce remedial statutes of limitations and procedure, such as the Arkansas nonsuit statutes, are clearly reserved to the state governments and any federal statutes seeking to limit application of such statutes in specific cases would be unconstitutional as it would be beyond those powers delegated to the federal government.

In the present case, however, there is no doubt but that Congress did not intend the Federal Rules of Civil Procedure to operate in such a manner. The federal statute specifically limits the application of the rules to be established as follows:

"Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant." (28 U. S. C. A. Sec. 723B)

The attempt of the Supreme Court of Arkansas to apply this rule to the nonsuit statute obviously greatly reduces the substantive rights of the petitioners in this case and therefore the use made of this rule by the Supreme Court of Arkansas is not only unconstitutional, but is unauthorized by the statute itself. Petitioners' right to a Writ of Certiorari could well rest on this ground alone under the principle announced in *Nutt* v. *Knut*, 50 L. Ed. 348, 200 U. S. 12. In Headnote 1 of that case, it is stated:

> "A party who insists that a judgment cannot be rendered against him consistently with the statute of the United States may be fairly held, within the meaning of U. S. Rev. Stat. Sec. 709, U. S. Comp. Stat. 1901, p. 575, providing for writs of error from the Supreme Court of the United States to the state courts, to assert a right and immunity under such statutes, although they may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary."

Point C

Violations of the "Due Process" Clause

Three of petitioners' issues are directed to this point and for convenience and clarity, we will separate this point into three subdivisions.

1. REFUSAL OF THE SUPREME COURT OF ARKANSAS TO DETERMINE WHEN THE NONSUIT WAS SUFFERED IN FEDERAL COURT.

It will be remembered that this cause has never been heard on its merits. The hearings in the state courts, which form the basis for petitioners' petition for Writ of Certiorari, were on a demurrer based on the Arkansas nonsuit statute which provides a period of one year after a nonsuit is suffered in which to bring a new action.

Bearing this in mind and examining the record in the Columbia Chancery Court and in the Arkansas Supreme

Court, we find that one major issue was presented to the Arkansas Supreme Court; i.e., "when was the nonsuit in Federal Court suffered?" If it be deemed to have been suffered at the time of any proceeding prior to that of February 28, 1946, at which time the District Court denied appellants' motion to amend their pleading so as to state jurisdiction, then the action was barred by the statute of limitations. If, on the other hand, the nonsuit be found to have been suffered on or after the said denial by the District Court of Appellants' motion to amend, then, the action in the state court was timely and trial on its merits should have been allowed.

The Constitution and statutes of Arkansas provide for an appeal to the Supreme Court of Arkansas as a matter of right. The right of appeal may not be withheld from any litigant, and with that right goes the right to have the cause *determined* by the Supreme Court of Arkansas. In the present case, however, the Supreme Court of Arkansas, although affirming the lower court, stated:

> "If (the decision of the U. S. Circuit Court of Appeals on August 8, 1945 is) treated as a nonsuit—*an issue we do not decide*—more than a year elapsed before the Chancery suit was filed in September of the following year." (R. 73) (Italics ours)

Inasmuch as the Supreme Court of Arkansas, *by its own language,* specifically stated that it did not decide the *only issue* presented in this case and the issue upon which the case was determined contrary to petitioners' interests, *the effect has been to deny to petitioners the right of appeal to the Supreme Court of Arkansas.* The Supreme Court, *without determining the only issue before it,* affirmed the action of the Columbia Chancery Court, and in so doing, it deprived petitioners of their property without the benefit of the process of law provided under the Constitution and

statutes of the State of Arkansas. This deprivation constituted a violation of the Federal Constitution, inasmuch as it deprived petitioners of their property without due process of law.

In regard to this point, it should be remembered that the violation occurred not in the lower court, but in the Supreme Court of the State of Arkansas. The violation, and therefore the constitutional ground, did not appear in the record until the rendition of its opinion by the Supreme Court on January 19, 1948. Petitioners urged this point in their petition and brief for rehearing, which was the first time after the point arose that they had the opportunity to argue the point, and therefore, their presentation of this issue was timely.

2. THE MINORS' PROPERTY RIGHTS.

Two of the plaintiffs herein, Patsy Marie Gilbert and Betty Jean Gilbert, are minors. Section 8918 of Pope's Digest of the Statutes of Arkansas provides that actions to recover interest in land must be brought within seven years, if at all. Under Section 8939 of Pope's Digest, the disability of minors is recognized and they are given, in addition to the seven year period, three years after they become twenty-one years of age within which to bring an action involving real property. Under these statutes the rights of minors in real property are not barred by limitations without a trial of their cause of action on its merits until three years after they become twenty-one years of age. (In construing this statute, the Supreme Court of Arkansas has held that as to female infants, the period of limitations starts to run after her eighteenth birthday. *Brake* v. *Sides,* 95 Ark. 74.)

Plaintiffs urged this point in their amended and substituted complaint in equity filed in the Columbia Chancery

Court (R. 40 et seq) but in the findings and decree of that court (R. 62 et seq and 66 et seq) no mention of this point was made although the plaintiffs are clearly shown in the decree (R. 66) to be minors. The point was again urged in Petitioners' brief before the Supreme Court of Arkansas (page 39 of petitioners' reply brief) and again the point was completely ignored, this time by the Supreme Court of Arkansas.

In Petitioners' petition for rehearing, directed to the Supreme Court of Arkansas, Point 9 specifically urged that the "court overlooked any mention of the fact that plaintiffs, Patsy Marie Gilbert and Betty Jean Gilbert, were and are minors, and, under the law in the State of Arkansas, are entitled to the tolling of the general statutes of limitations until three years after they reach their majority, unless an action is brought in their behalf and tried on its merits prior to that limit. Inasmuch as the court did not mention these facts in its opinion, we must assume that the court overlooked these important facts in making its decision."

Inasmuch as the petition for rehearing was denied without a written opinion, the state courts have completely ignored the rights assured to minors under the laws of Arkansas, and to thus take from them their property rights without any litigation whatever thereof, is to deprive them of their property without due process of law in violation of the Constitution of the United States of America.

3. DENIAL OF THE BENEFITS OF THE NONSUIT STATUTE TO PETITIONERS.

In its opinion, the Supreme Court, without giving any valid reason therefor, denied to these petitioners, who were appellants therein, the benefits of the nonsuit statute as digested in Section 8947 of Pope's Digest, and in its denial to them of the benefits of this statute, it foreclosed

their rights in the property involved in that action. To thus deprive them of their property without granting to them the benefits of a statute granted to other citizens of the State of Arkansas constituted a denial to them of the equal privileges and immunities of other citizens of the State of Arkansas, and served to take from them their property without due process of law.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power, in order that the judgment and decree of the Chancery Court of Columbia County, Arkansas and the decision and judgment of the Supreme Court of Arkansas may be corrected, and that, to such an end, a Writ of Certiorari should be granted, and this court should review the decision of the Supreme Court of Arkansas and the record on which it is based, and finally reverse that decision and order that petitioners be given a trial of their cause of action on its merits.

Respectfully submitted,

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El Dorado, Arkansas;
Henry B. Whitley,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 67

HORACE A. YOUNG, BETTY JEAN GILBERT AND PATSY MARIE GILBERT, MINORS, BY MRS. EDNA MATTHEWS GILBERT, THEIR TUTRIX AND AS NEXT FRIEND; CORBIN DISMUKES AND GARALDINE DISMUKES ROBERTS,

Petitioners,

vs.

ASA C. GARRETT, FRANK GARRETT, R. S. FOSTER, MID-CONTINENT PETROLEUM CORPORATION AND THE CARTER OIL COMPANY, A CORPORATION,

Respondents

BRIEF OF PETITIONERS' IN REPLY TO RESPONDENTS' BRIEF

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INDEX

AUTHORITIES

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No. 67

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Respondents

BRIEF OF PETITIONERS IN REPLY TO RESPONDENTS' BRIEF

RESPONDENTS' CONTENTION, THAT THE U. S. COURT OF APPEALS, IN ITS ORDER REMANDING THE ACTION TO THE DISTRICT COURT WITH INSTRUCTIONS TO PERMIT APPELLANTS TO APPLY TO THAT COURT FOR LEAVE TO AMEND THEIR COMPLAINT, DID NOT HAVE THE EFFECT OF DIRECTING OR AUTHORIZING FURTHER PROCEEDINGS IN FEDERAL COURT, IS NOT WELL FOUNDED

A careful review of "Brief of Respondents in Opposition to Petitioners' Petition for Writ of Certiorari and to their

Brief in Support thereof" reveals certain discrepancies as well as some misinterpretation of the law relating to the case at bar, and, without undue discussion, we desire to point out these discrepancies.

At page 4 of Respondents' Brief, respondents state:

> "On August 8, 1945, the court denied said petition for rehearing and remanded said actions to the District Court *with instructions* to 'permit the appellants to apply to that court for leave to amend their complaint, if they so elect, for the purpose of stating jurisdiction, if possible * * *'." (Italics ours)

Counsel for respondents, after making this statement, then interprets the court's language as set out above to mean that the only significance of the Circuit Court of Appeals' action in remanding the cause was to amend their complaints. The language of the court, as quoted by counsel for respondents (see above) refutes this argument without necessity for further discussion, for the Circuit Court of Appeals *instructed the District Court to permit appellants to apply for leave to amend.* The action of the Circuit Court of Appeals was not intended as permission to the plaintiffs, but, instead, was intended as instruction to the District Court. Regardless of the final determination that the Circuit Court of Appeals exceeded its authority in so instructing the District Court, plaintiffs had a right to rely upon the order of that court remanding the case, and to determine now that insofar as the nonsuit is concerned, that plaintiffs had no right to rely on the order of the Circuit Court of Appeals would be to destroy the faith of the people in the courts.

The Arkansas nonsuit statute was enacted for the purpose of extending the time within which persons could file new suits after nonsuit without the loss of their rights because of the running of the period of statute of limita-

tions. The application of that statute to this case is certainly in line with the purpose for which this remedial statute was enacted. The Arkansas Supreme Court has consistently held that the remedy should be held to be coextensive with the evil, and under such determination, it certainly was applicable in the case at bar. This was not a mere erroneous decision. It was, in fact, one which denied to plaintiffs the benefits of the applicable statute in this case.

Regardless of how the language of the U. S. Circuit Court of Appeals may be twisted to meet respondents' needs, it is obvious that the order entered therein had the effect of authorizing and even directing further proceedings in the court. So long as there were further proceedings authorized or directed, no nonsuit could have been suffered, for the nonsuit could only have been suffered upon the termination of all proceedings in the Federal courts.

Refusal of the Supreme Court of Arkansas to Determine the Only Issue Before It

Respondents contend (page 7 of their brief) that the Supreme Court of Arkansas did not determine when the nonsuit was suffered. This was pointed out by petitioners in their original brief (pages 20 *et seq.*). The effect of the Supreme Court's refusal was to fix the time at which the nonsuit was suffered as being sometime prior to the final proceeding in the Federal courts, but the actual language of the court and its actual determination amounted to a refusal to determine the issue. Respondents contend that the Supreme Court of Arkansas had a right to refuse to determine this issue and that the Supreme Court is the only judge of when and to whom a statute shall or shall not be applied. The statute is a duly enacted statute of Arkansas. It provides that in cases of nonsuit, a period of one year after the date of nonsuit is allowed for the bringing of the

new action. There are no further conditions other than this and were it determined that the nonsuit was suffered on or after September 19, 1945 (one year prior to the bringing of the action in the Columbia Chancery Court), then the courts had no alternative other than to hold that the bringing of the action was timely.

The Columbia Chancery Court wrongly determined that the nonsuit was suffered on August 8, 1945. The lower court's opinion specifically so states. Petitioners contended that such a holding was wrong and appealed the case to the Supreme Court of Arkansas. Had the Supreme Court of Arkansas announced that it determined that the nonsuit was suffered August 8, 1945, and that it therefore affirmed the lower court's opinion, or had it affirmed the lower court's decision without a written opinion, thus, in effect, adopting the decision of the lower court as being correct in all particulars, such decision would have presented no Federal question insofar as this particular point is concerned, for although the opinion would have been erroneous, it would have been a decision by the Arkansas Supreme Court, and the fact that it was erroneous would not serve to provide review before the Supreme Court of the United States. But the Supreme Court of Arkansas, instead of so determining or so holding, held specifically that it did not determine that the nonsuit was suffered on August 8, 1945. It specifically stated that it did not determine *when* the nonsuit was suffered (page 21).

When it so held, it, in effect, stated: "We will affirm the decision of the Columbia Chancery Court, although we do not determine whether it was right or wrong", and when it took this attitude, it deprived plaintiffs of the right of appeal, for their issue was not determined on appeal, although the Supreme Court specifically stated that it was not holding that the decision of the lower court was correct.

The Constitution and Statutes of Arkansas provide for

appeal to the Supreme Court of Arkansas from decisions of the lower courts as a matter of right. In other words, due process in Arkansas includes the right of appeal to the Supreme Court, and this includes a determination of the issues. This does not necessarily mean that the Supreme Court of Arkansas must write an opinion on each matter presented to it, for in cases where it does not write an opinion, it will be assumed that the Supreme Court adopts in its entirety the decision of the lower court. In the present case, however, the Supreme Court, by its own language, did not adopt the decision of the lower court, nor did it determine the issue, and for this reason, due process was not afforded petitioners in the courts of Arkansas.

Respondents recognized the fact that the Supreme Court refused to determine the issue in the case. [See page 7 of Respondents' Brief where respondents state: "*Said court specifically declined to determine whether petitioners suffered nonsuit in their prior actions on said date.*" (Italics ours)] Respondents, however, do not attempt to argue petitioners' contention in this matter although they recognize the issue. (See last sentence on page 7 of Respondents' Brief.)

The Interest of the Minor Petitioners

Respondents urge this Court to refuse to consider the rights of the minors, Betty Jean Gilbert and Patsy Marie Gilbert, because they claim that the law in Arkansas is well settled as to the minors' substantive right to claim their disability of minority in cases such as the one at bar. The facts involving this case are, however, considerably different from any case previously decided upon by the Supreme Court of Arkansas.

However, before we discuss the minors' right to claim their disability herein, let us consider whether or not due process of law has been afforded the minors. It cannot be

denied that they are entitled to their day in court regardless of the validity of their claim of disability. This claim of disability was urged in the Chancery Court of Columbia County, Arkansas. The Federal question was not urged for the simple reason that the plaintiffs did not and, indeed, could not foresee that the Chancellor did deny their claim without even ruling on it in any way whatever. The Chancellor, in the findings of the court and in the decree, however, denied the rights of the minors without determination of the issue as to whether they were entitled to an extension of the period of limitations because of their minority. This very simple question was not even discussed by the Chancellor in the findings and in the decree. The point was then urged before the Supreme Court of Arkansas and it was insisted in plaintiffs' (appellants) brief that the rights of the minors had been overlooked by the Columbia Chancery Court and that the minors were entitled, as a part of their constitutional right, to a determination of this issue. Again, their rights were ignored and the Supreme Court, in its opinion in this case, made no mention whatever of the minors and their right to consideration of their disability because of their minority.

Respondents urge that the Supreme Court did not have to write an opinion and, therefore, it did not have to rule on this important issue. But, the issue must certainly have been determined by some court, for if the issue were not determined and at the same time the minors were barred from claiming their rights in the future because of the doctrine of *res judicata*, then the minors' property and rights were taken from them without due process of law in violation of the Federal Constitution.

This matter was pointed out to the Supreme Court of Arkansas on petition for rehearing. This was not the first time the issue had been urged, but it was urged more strongly for the reason that it has not been foreseeable

by plaintiffs (appellants) that both the Columbia Chancery Court and the Supreme Court of Arkansas would attempt to take away these minors' rights without a legal determination of their claim to the right to evoke their disability.

For the above reasons, it is respectfully submitted that regardless of whether the minor petitioners are right or wrong in their contention that they have a valid disability and that, therefore, the period of limitations has not run on their cause of action, they are entitled to due process of law before this claim is dismissed and barred by the doctrine of *res judicata,* and inasmuch as this has not been done, they are entitled now to a writ of certiorari so that their claim may be properly adjudicated.

Let us now determine the merit of their claim to the right to invoke their disability of minority in view of the Constitution and laws of Arkansas and decisions of the Arkansas Supreme Court in connection therewith. Section 8939 of Pope's Digest provides:

> "If any person entitled to bring any action, under any law of this State, be, at the time of the accrual of the cause of action, under twenty-one years of age, or insane or imprisoned beyond the limits of the State, such person shall be at liberty to bring such action within three years next after full age, or such disability may be removed."

In the present case, upon the death of Sarah E. Pace, her daughter, Mary Christine Pace, had a cause of action for recovery of her portion of this land. Mary Christine Pace was *non compos mentis* from the date of her birth to the date of her death on December 27, 1939. The period of limitations did not and, indeed, could not run during the period of her disability, which was the entire period of her life. Upon her death, a cause of action accrued to Betty Jean Gilbert and Patsy Marie Gilbert, minors, in connection

with their right to recover the land which they had inherited. In other words, the cause of action of the minor children arose upon the death of Mary Christine Pace and prior to that time they had no cause of action.

Section 8951 of Pope's Digest states:

> "No person shall avail himself of any disability in this act mentioned unless such disability existed at the time the right of action accrued."

This is the only section of Pope's Digest having to do with limitation as to claiming disability in connection with the statute of limitation. The Act digested in this section was brought forward in the revised statutes. It is a very old act and was passed by the Legislature at a time when coverture of a female constituted a disability. The purpose of it was to keep heirs of a female who married while still a minor from claiming her disability during the entire period of her lifetime by tacking the disability of minority to that of coverture.

This section does not apply in the case at bar, for the right of action of the minors, Betty Jean Gilbert and Patsy Marie Gilbert, accrued on December 27, 1939, the date of the death of Mary Christine Pace. Their disability of minority existed then and exists now and that is the disability of which they wish to avail themselves. Thus, it may be seen that Section 8951 of Pope's Digest does not bar them from asserting their disability of minority.

Respondents cite *Dowell* v. *Tucker*, 46 Ark. 438; *Millington* v. *Hill*, 47 Ark. 301; *Reed* v. *Money*, 115 Ark. 1 and *Hoggard* v. *Mitchell*, 164 Ark. 296 as authorities for their contention that the minors' right to assert their disability of minority is barred because of Section 8951 of Pope's Digest. An examination of these Arkansas cases, however, reveals that every one of them involves the disability of a married woman during coverture, which was the precise type of

case for which the act digested in Section 8951 of Pope's Digest was enacted. This is obvious from the language of the court in *Reed* v. *Money*, 115 Ark. 1, 8, where it was stated by the court:

> "Appellant contends that her marriage to Reed in 1871, before she reached her majority, prevented the bar of the statute of limitations on account of nonage attaching. But appellant can not tack her disability of coverture and nonage in order to prevent the bar of the statute, *for at the time her alleged cause of action accrued she did not labor under a double disability.* She was an infant at that time, but she was not also a married woman. No cumulative disability shall prevent the bar of the statute of limitations. Last clause of section 5656, supra." (Italics ours)

It may also be seen from the language of the court in *Millington* v. *Hill, supra,* as follows:

> "Mrs. Millington undertook to evade the force of the statute by alleging that she was under age in 1863, and afterwards married and is still covert, but she cannot tack her disabilities in this way. *She should have brought her suit within the period allowed her by the statute after coming of age, notwithstanding her coverture.*" (Italics ours)

The reasoning in these cases is obviously not applicable in the case at bar. Mary Christine Pace was *non compos mentis* and at no time during her lifetime did she have sufficient mental ability to realize that she had property or property rights. The minors, Betty Jean Gilbert and Patsy Marie Gilbert, were, at the time of accrual of their cause of action, seven years and three years of age, respectively, and at this tender age could have no knowledge of their duty to bring an action. It was recognized by the courts even during the period when coverture constituted a disability that a married woman of normal intelligence

had sense enough to know what her rights were and could, through the aid of her husband and friends, protect her rights. For that reason she did not need to be protected further than the single protection of disability because of coverture. The disability of coverture did not arise out of any actual need, present at the time of the enactment of the statute digested in Section 8951 of Pope's Digest, but, instead, was a "hangover" from the Common Law of England, and developed during the time when married women were considered little more than chattels.

The only need for such a statute present at the time of the passing of the act providing disability for wives under coverture was protection from the fraud of their husbands. The statute therefore granted a dual disability only in cases where the dual disability (i.e., minority and coverture), was present when the cause of action arose. Where the cause of action arose during minority, but not during coverture, the dual disability was not deemed necessary, for the husband would have as much reason to want to recover his wife's lands as would the wife.

The above merely proposes to explain the reason for the act digested in Section 8951 of Pope's Digest and the old act granting disability to *femmes* covert. Inasmuch as disability of coverture has been removed since the passage of the act digested in Section 8951 of Pope's Digest, the significance of this section is restricted to cases involving disability of coverture when that disability could be claimed. It is not applicable here.

Use of Rule 60B of the Federal Rules of Civil Procedure In Interpreting State Statutes

Respondents argue, first, that the Supreme Court of Arkansas did not apply Rule 60B of the Federal Rules of Civil Procedure in interpretation of the nonsuit statute, but an even casual reading of the opinion of the Arkansas

Supreme Court leaves no doubt but that that court did rely almost wholly upon this Federal rule to deny plaintiffs the right to trial on the merits of their case.

Counsel for respondents, after arguing this point, apparently reread the opinion of the Arkansas Supreme Court, for they stated:

> "And even if it had looked to said rule to ascertain whether the present action was brought within the time prescribed by the aforesaid Section 8947, Pope's Digest, it still would have been simply construing and applying said statute, and, under the decisions above cited, this Court could not review its action."

This argument is, of course, erroneous on its face, for once it be determined that the Arkansas Supreme Court applied the Federal Rules of Civil Procedure to its interpretation of a State statute, then it must be recognized that the portion of the Federal Constitution relating to delegation and reservation of powers between the State and Federal governments has been violated.

In the present case, the situation is even stronger, for Congress, in enacting the enabling act for the Federal Rules of Civil Procedure (28 U. S. C. A., Section 723b), specifically provided that the rules were to be for use in Federal courts only and were to have no application in State courts. The Federal courts have further determined that the Federal Rules of Civil Procedure shall not, in any way, affect the rights of parties in State courts. (*Reader* v. *Baltimore and Ohio Railroad Co.*, C. C. A. Ill., 1940, 108 F.(2d) 980.)

When respondents tacitly admitted that this rule was used by the Supreme Court of Arkansas to interpret a State statute, they thereby opened the door for review of that court's opinion by the Supreme Court of the United States.

Was Presentation of the Federal Questions Involved Herein Timely?

Respondents, at page 12 of their brief, apparently in sheer desperation, finally urge that petitioners are not entitled to a review of the Federal questions presented herein because the questions were not raised in time. Respondents cite several cases in support of this contention. These cases merely hold that the Federal questions must be presented as soon as they arise, and if they arose in the lower court, they must be urged in the lower court. *Radio Station WOW, Inc., et al.* v. *Johnson,* 89 L. Ed. 2092, 326 U. S. 120 (Headnote 4) is authority for petitioners' contention that when the Federal question is presented at the first opportunity after such question has arisen, it is timely. Let us now examine a few of petitioners' contentions to determine whether the presentation of the Federal questions involved in each was timely.

One of petitioners' contentions is that refusal of the Supreme Court to determine the issue before it, amounted to refusal by that court to review the case on appeal, and that this constituted a denial of petitioner's right of appeal guaranteed under the Arkansas Constitution and laws, which, in turn, constituted denial of due process. As pointed out above, had the Supreme Court affirmed, with or without written opinion, the determination by the Columbia Chancery Court that a nonsuit was suffered in Federal Court on August 8, 1945, there would have been no Federal question in connection therewith, even if the decision had been admittedly wrong, but, by refusing to determine this all-important issue, due process was denied even should it be determined that the nonsuit was actually suffered on August 8, 1945. The denial of due process is certainly in violation of the Federal Constitution and is a Federal question. It did not arise in the Columbia Chancery Court and,

therefore, it could not have been presented to that court nor could it have been presented on appeal. Petitioners' first opportunity to present the question after it arose was on petition for rehearing, and the issue was then and there presented, but without avail. Under authority of *Radio Station WOW, Inc., et al.* v. *Johnson, supra,* this Federal question was properly raised.

Another of petitioners' contentions is that the State courts denied full force and effect to the order of the Circuit Court of Appeals remanding this case to the District Court for leave to amend. This Federal question was urged in the lower court, was urged on appeal to the Supreme Court of Arkansas, and was again urged in petitioners' petition for rehearing. It has been, since the beginning of this action in the Columbia Chancery Court, one of petitioners' main contentions and how, in view of the discussion throughout the trial of this case, respondents can now state that petitioners did not raise this question until their petition for rehearing in the Supreme Court of Arkansas, is beyond us. The record will reveal that this has been one of the main issues throughout the trial of this case.

The Federal question as to violation of the Federal Constitution's provisions for separation of powers between the State and Federal governments, said violation arising out of the Supreme Court's use of Rule 60B of the Federal Rules of Civil Procedure to interpret the State statute, was raised for the first time on petition for rehearing, which was the first opportunity petitioners had to present the question after it arose in the opinion of the Supreme Court of Arkansas.

As was heretofore pointed out, the right of the minors to claim the disability of their minority has been asserted throughout the proceedings. In fact, it has been continually brought to the attention of the courts that to refuse

to make any determination of their rights constitutes taking their property without due process of law.

Thus, we see that there is no merit whatever in respondents' contention that the presentation of the Federal questions involved herein was not timely.

Conclusion

In conclusion petitioners reiterate their request for a Writ of Certiorari so that due process of law may be afforded them and they may have a hearing of their case on its merits. It should be remembered that petitioners, although they have diligently and persistently pursued what they honestly believed to be their remedy from the time when their cause of action arose until the present time, have been constantly denied the trial of their case on its merits. They cannot be said to have been guilty of laches nor of negligence in any way. Should this Court deny them a Writ of Certiorari, then their opponents will have been successful in preventing the trial of a legitimate cause of action in which the plaintiffs were without blame as to either the Arkansas statute of limitation or the doctrine of laches.

In the past half century our court system in this country has, by means of legislation and by development of the *lex fori*, turned away from the old "sporting theory" of law. Modern legislation and advanced judicial thought incline toward the abolition of a system whereby a litigant could lose his right to a trial of his case on its merits because of an error in choosing a forum or the form of his pleading. Such legislation and judicial thought is aimed at giving to every litigant a right to a trial of his case on its merits, such trial to be denied only when the litigant is lax or delinquent in pursuing his remedy. If this Court denies that these petitioners have a right to a trial on its merits, keeping in mind the fact that they have not been negligent,

and that the doctrine of laches is not available to respondents, then, indeed, it may be said that the ghost of the "sporting theory" of justice has arisen from the grave.

Respectfully submitted,

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By J. R. WILSON,
Counsel for Petitioners.

(7933)

TABLE OF CASES.

TABLE OF CASES—Continued.

Text Books and Statutes Cited.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1947.

No. 834

HORACE A. YOUNG, BETTY JEAN GILBERT AND PATSY MARIE GILBERT, MINORS, BY MRS. EDNA MATTHEWS GILBERT, THEIR TUTRIX AND AS NEXT FRIEND; CORBIN DISMUKES AND GERALDINE DISMUKES ROBERTS, *Petitioners,*

vs.

ASA C. GARRETT, FRANK GARRETT, R. S. FOSTER, MID-CONTINENT PETROLEUM CORPORATION AND THE CARTER OIL COMPANY, A CORPORATION, *Respondents.*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF *CERTIORARI* AND TO THEIR BRIEF IN SUPPORT THEREOF.

Petitioners herein seek a *writ of certiorari* to the Supreme Court of Arkansas to obtain review of a judgment of that court affirming a judgment of dismissal of the above entitled action entered by the Chancery Court of Columbia County, Arkansas, upon respondents' demurrer to petitioners' complaint and amendments thereto and to their amended and supplemental complaint. Both of said courts held

that said action was barred by the Arkansas statutes of limitation. (R. 62-74)

Petitioners' petition herein must be denied because no federal question is presented herein, and even if any federal question is presented the same was not timely and properly raised in the court below. Because we think it will be conducive to clarity, before discussing the jurisdiction of this Court, and petitioners' contentions herein, we will make a statement of the pertinent facts herein.

The above action was commenced by petitioners in the aforesaid Chancery Court on September 19, 1946, against respondents herein, to establish title to, and recover possession of, an undivided 1/9th interest in and to certain described lands in Columbia County, Arkansas, and for an accounting for rents, issues and profits therefrom. Petitioners claim that Mary Christine Pace, who is alleged to have been *non compos mentis* from the date of her birth on August 24, 1865, to the date of her death on December 27, 1939, acquired an undivided 1/9th interest in said land, on the death of her mother, Sarah E. Pace, on February 14, 1898. Petitioner Young claims an undivided 5/6ths of said 1/9th interest allegedly so acquired by Mary Christine Pace by purchase thereof from alleged heirs and heirs of heirs of Mary Christine Pace. The remaining petitioners, who we will hereinafter refer to as the Gilbert group, claim an undivided 1/6th of said 1/9th interest by inheritance of 1/7th thereof from Mary Christine Pace and by inheritance of 1/6th of 1/7th thereof from Bob Winfield Pace, which interest they claim Bob Winfield Pace inherited from his sister, Mary Christine Pace. Two of the petitioners in the Gilbert group, Betty Jean Gilbert and Patsy Marie Gilbert, each of whom claim an undivided 1/324th interest in the land involved herein, are alleged to be minors. (R. 1-10, 24, 40-50)

Respondents and their predecessors in interest have been in adverse possession of the land involved herein and have paid taxes thereon continuously since about August 28, 1890, long prior to the death of Mary Christine Pace. (*Young* v. *Garrett, et al.,* 5 F. R. D. 117, loc cit. 122.)

Petitioners do not deny that the above action was barred by the Arkansas statutes of limitation unless the same was brought within the time prescribed by Section 8947, Pope's Digest of the Statutes of Arkansas, which authorizes the maintenance of an action otherwise barred by limitation if the same is commenced within one year after a nonsuit is suffered in a prior action commenced within the period allowed by the statutes of limitation, or unless the same was not barred as to the aforesaid minor petitioners under Section 8939, Pope's Digest of the Statutes of Arkansas, because of their minority. Petitioners claim that the Supreme Court of Arkansas erred in not holding that said action was commenced within one year after they suffered nonsuits in certain actions commenced in the United States District Court for the Western District of Arkansas within the period prescribed by Section 8918, Pope's Digest of the Statutes of Arkansas, and further erred in not holding that under said Section 8939 said minor petitioners were not barred because of their minority.

One of the above referred to actions commenced in the United States District Court for the Western District of Arkansas was filed by Young on December 24, 1942, and the other thereof was filed by the Gilbert group on the same date. Therein, Young and Gilbert group, respectively, asserted the same basic claims asserted by them herein. (R. 45) On September 14, 1943, the United States District Court entered judgments dismissing said actions upon the ground that the court was without jurisdiction thereof. (R. 1, 45;

Young v. *Garrett, et al.*, 3 F. R. D. 193.) Young and the Gilbert group, without requesting or being granted leave to amend their respective complaints, each appealed from said judgments of dismissal to the United States Circuit Court of Appeals for the Eighth Circuit, and on May 9, 1945, said court handed down its decision affirming said judgments of dismissal without modification or qualification. (R. 1-2, 28, 30, 45; *Young* v. *Garrett, et al.*, 5 F. R. D. 117, loc. cit. 119, 149 F. (2d) 223.) Thereafter, Young and the Gilbert group each filed petitions for rehearing or for remand of said actions to the District Court for amendment of their respective complaints in order that they might establish jurisdiction of a part of their respective claims. (R. 30, 31) On August 8, 1945, the court denied said petitions for rehearing and remanded said actions to the District Court with instructions to "permit the appellants to apply to that court for leave to amend their complaint, if they so elect, for the purpose of stating jurisdiction, if possible * * *." (R. 30-31) The Circuit Court of Appeals did not vacate or set aside, or direct the District Court to vacate or set aside, the District Court's judgments of dismissal and did not grant either Young or the Gilbert group leave to amend their respective complaints, but merely gave them permission to apply to the District Court for leave to amend the same.

Thereafter, on September 24, 1945, petitioners filed, in the United States District Court, in their respective actions, motions for leave to file amended and substituted complaints, copies of which were attached to their respective motions. In an effort to overcome objections to the jurisdiction of the federal court, petitioners in their respective proffered amended and substituted complaints, limited to a certain extent their respective claims to recover rents, is-

sues and profits from, and damages to, the land involved herein. On February 28, 1946, the United States District Court denied leave to file said proffered amended and substituted complaints in each of said actions upon the grounds, (*1*) that, because final judgments of dismissal had been entered in each of said actions on September 14, 1943, more than six months prior to the date said motions to file amended and substituted complaints were filed, the court, under Rule 60(b) of the Federal Rules of Civil Procedure was without power to set aside said judgments of dismissal and to permit said amended and substituted complaints to be filed, and (*2*) that, assuming that the court had such power, the facts and circumstances in each of said cases would not justify granting permission to file the same. (R. 2, 28, 45-46; *Young* v. *Garrett, et al.*, 5 F. R. D. 117.) In other words, the District Court held that, since its judgments of dismissal entered on September 14, 1943, had been affirmed on May 9, 1945, without qualification or modification, and petitions for rehearing had been denied on August 8, 1945, it could not permit petitioners to file amended and substituted complaints without vacating or modifying said judgments of dismisal, which, under Rule 60(b) of the Federal Rules of Civil Procedure, it was without authority to do. Differently stated it held that after August 8, 1945, said judgments of dismissal were final judgments. Petitioners appealed to the Circuit Court of Appeals for the Eighth Circuit from said judgments of the District Court, and on February 25, 1947, after the commencement of the case at bar, said Circuit Court of Appeals affirmed said judgments of the District Court. (R. 2, 46; *Young* v. *Garrett, et al.*, 159 F. (2d) 634.) Petitioners requested an extension of time for hearing herein in the Chancery Court to afford them time to apply to this Court for a *writ of certiorari* to the Circuit Court of Appeals but abandoned their plan therefor. (R. 34-35, 36)

A very comprehensive history of the litigation between the parties hereto prior to the commencement of the case at bar appears in the opinion of the District Court in *Young* v. *Garrett, et al.,* 5 F. R. D. 117, and we respectfully refer the Court thereto.

The Supreme Court of Arkansas in its opinion herein, after reciting the facts in connection with the aforesaid actions in the federal court and the judgments of the District Court and the Circuit Court of Appeals therein, and after referring to the holding of the District Court as to the effect of Rule 60(b) of the Federal Rules of Civil Procedure upon the finality of said court's aforesaid judgments of dismissal, said:

> "Under this construction of the rule—a construction we must accept in view of the affirmance without a finding that the District Court was in error on any point advanced—the problem presented is whether (as appellants contend) the statute of limitation was tolled not only during the period of appeal from the order of September 14, 1943, but during the time that ran after the decision of August 8, 1945.
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> "But wording of the act (8947, Pope's Digest) does not justify belief that it was the legislative purpose to so liberalize this gratuity (the privilege of filing a new action) that irrespective of adverse judicial decisions in a given case that the controversy in that jurisdiction had been terminated, a period of one year would yet remain while courts were reaffirming what had already been explicitly held.
>
> "When the Court of Appeals refused to grant a rehearing and affirmed Judge MILLER's order of dismissal, it appears to have attempted to confer upon the trial court a power subsequently found to be non-existent. That is the effect of Judge MILLER's holding, and

on appeal for the second time in these cases he was not reversed. So, in effect, rights of the parties to maintain their suits in federal court were settled by the appellate court August 8, 1945, and under Rule 60(b) the judgment was a finality. If treated as a nonsuit—an issue we do not decide—more than a year elapsed before the chancery suit was filed in September of the following year." (R. 72-73)

It is obvious from the foregoing that petitioners' contention herein that the Supreme Court of Arkansas "determined" that the aforesaid order of the Circuit Court of Appeals of August 8, 1945, "allowed no further proceedings in the federal courts" is wholly unfounded. Said court did not suggest or intimate that such was the effect of said order. Said court merely held that further proceedings had in the federal courts did not extend the time allowed for filing the case at bar.

It is also obvious that petitioners' contention herein that the Supreme Court of Arkansas "wrongfuly determined" that the aforesaid orders of the Circuit Court of Appeals of August 8, 1945, constituted nonsuits as of said date in the aforesaid actions in the federal court is wholly unfounded. Said court specifically declined to determine whether petitioners suffered nonsuit in their prior actions on said date. It held that the time to file a new action, under the aforesaid Section 8947, Pope's Digest, after a judgment of dismissal in a prior action had been affirmed by an appellate court was not extended while the courts were reaffirming such judgment, regardless of whether a technical nonsuit was suffered. In fact petitioners allege in the fourth reason relied upon in their petition herein that the Supreme Court of Arkansas erroneously refused to determine when they suffered nonsuits in their aforesaid actions in the federal court.

Furthermore, even if the Supreme Court of Arkansas had held that petitioners suffered nonsuits in their aforesaid actions in the federal court on August 8, 1945, its holding would have been absolutely correct and not erroneous. As we have hereinabove seen, the Circuit Court of Appeals affirmed the District Court's judgments of dismissal therein, refused to vacate, or to authorize the District Court to vacate the same, and in its aforesaid order of August 8, 1945, denying petitioners' petitions for rehearing, merely gave petitioners permission to do what they had the right to do without such permission, *i. e.*, apply to the District Court to vacate its judgments of dismissal and request leave to file amended complaints. Until said judgments of dismissal were vacated no amended complaints could be filed or any other proceedings had, and the same stood as nonsuits. *Realty Acceptance Corp.* v. *Montgomery,* 284 U. S. 547, 76 L. ed. 476; *Ellison, et al.,* v. *Ward, et al.,* 294 Ill. A. 197, 13 N. E. (2d) 649; 27 C. J. S., p. 261, Sec. 77; and 17 Am. Jur., p. 90, Sec. 63. And under all the authorities the time to file a new action under statutes similar to the aforesaid Section 8947 is not stayed, pending determination of an application to vacate or set aside a judgment of dismissal in a former action, *Zielinski* v. *United States,* (C. C. A. 2d) 120 F. (2d) 792; *Waterman* v. *Powell,* (C. C. A. 5th) 66 F. (2d) 80, and *Adams* v. *Holton,* 111 Ia. 54, 82 N. W. 468. Clearly, petitioners' motions for permission to amend their complaints were, under the circumstances, motions to vacate said judgments of dismissal and to permit filing of amended complaints.

It is further obvious from the foregoing that petitioners' contention herein that the Supreme Court of Arkansas ignored, and failed to give full faith and credit to, the aforesaid order of the Circuit Court of Appeals of August 8,

1945, is without merit. Clearly, the Supreme Court of Arkansas accepted, acknowledged and followed the interpretation placed upon said order by the District Court and by the Circuit Court of Appeals in subsequent proceedings in said courts. The District Court held, and the Circuit Court of Appeals affirmed, that under said order of August 8, 1945, neither it nor any other federal court could, after said date, vacate or modify the judgments of dismissal theretofore entered by it, or in other words, that said judgments were final on August 8, 1945, and that is exactly what the Supreme Court of Arkansas said it held. And, since the Supreme Court of Arkansas accepted the conclusion of the District Court and the Circuit Court of Appeals as to the operation and effect of the aforesaid order of August 8, 1945, no federal question is presented herein. 10 Cyc. Fed. Proc., (2d ed.), p. 433; *McLaughlin Bros.* v. *Hallowell,* 228 U. S. 278, 57 L. ed. 835; *Arkansas, ex rel. Utley,* v. *St. Louis & S. F. R. Co.,* 269 U. S. 172, 70 L. ed. 219; *The Winona and St. Peter R. Co.* v. *Town of Plainview,* 143 U. S. 371, 36 L. ed. 191; and *Leonard* v. *Vicksburg S. & P. R. Co.,* 198 U. S. 416, 49 L. ed. 1108.

Furthermore, since the Supreme Court of Arkansas simply determined herein the effect of proceedings in the federal courts after August 8, 1945, upon the running of the time prescribed by the aforesaid Section 8947, Pope's Digest, for the commencement of the case at bar, and merely construed and applied the state statutes of limitation, and since said court recognized and conceded the validity and regularity of said proceedings, no federal question is presented and the decision of said court is not subject to reexamination by this Court. *Moran* v. *Horsky,* 178 U. S. 205, 44 L. ed. 1038; *Carothers* v. *Mayer, et al.,* 164 U. S. 325, 41 L. ed. 453; *Harrison* v. *Myer,* 92 U. S. 111, 23 L. ed. 606;

Preston v. *City of Chicago,* 226 U. S. 447, 57 L. ed. 293; *Wood* v. *Chesborough,* 228 U. S. 672, 57 L. ed. 1018; *Great Western Telegraph Co.* v. *Purdy,* 162 U. S. 329, 40 L. ed. 986; *Avery* v. *Popper,* 179 U. S. 305, 45 L. ed. 203; and 36 C. J. S., p. 160, Sec. 251. The situation involved herein is no different than it would be if the aforesaid orders of August 8, 1945, had been entered by an Arkansas court, and said subsequent proceedings had in Arkansas courts.

It is likewise obvious that petitioners' contention herein that the Supreme Court of Arkansas applied Rule 60(b) of the Federal Rules of Civil Procedure in interpreting and applying the state statutes of limitation is unmeritorious. The Supreme Court of Arkansas did not, in its opinion herein, interpret or apply said rule, but discussed only what the District Court said was the effect of said rule upon the District Court's power to vacate its aforesaid judgments of dismissal. And even if it had looked to said rule to ascertain whether the present action was brought within the time prescribed by the aforesaid Section 8947, Pope's Digest, it still would have been simply construing and applying said statute and, under the decisions above cited, this Court could not review its action.

Petitioners' contentions herein that the Supreme Court of Arkansas denied them their property without due process of law by refusing to determine when they suffered nonsuit in their aforesaid actions in the federal court, by refusing to hold that the aforesaid minor petitioners were not barred by the statutes of limitation, because of their minority, and in allegedly denying to them the benefits of the aforesaid Section 8947, Pope's Digest, do not present any federal question. In the first place it is well established that a decision of a court involving the ownership of property with all parties in interest before it, cannot be regard-

ed by the unsuccessful party as a deprivation of property without due process of law simply because its effect is to deny his claim of ownership in such property. *Tracy* v. *Ginzberg*, 205 U. S. 170, 51 L. ed. 755. In addition, said contentions simply boil down to the claim that the decision of the Supreme Court of Arkansas herein is erroneous, and a constitutional provision is violated by an erroneous decision of a state court. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 74 L. ed. 1107; *In the Matter of Eugene M. Converse*, 137 U. S. 624, 34 L. ed. 796; *Neblett* v. *Carpenter*, 305 U. S. 297, 83 L. ed. 183; *Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25, 61 L. ed. 966; *Worchester County Trust Co.* v. *Riley*, 302 U. S. 292, 82 L. ed. 268; and *Bonner* v. *Gorman*, 213 U. S. 86, 53 L. ed. 709. Moreover, as we have hereinabove seen, the Supreme Court of Arkansas did not commit any error in its conclusion that the case at bar was not brought within the time prescribed by said Section 8947. Neither did it err in failing to hold that said minor petitioners were not barred by the statutes of limitation because of their minority. It will be recalled that the cause of action involved herein accrued during the lifetime of Mary Christine Pace, an alleged incompetent, and that said minor petitioners claim their interest in the land involved herein by inheritance of a part thereof from Mary Christine Pace and by inheritance of the remainder thereof from Bob Winfield Pace, which interest they claim Bob Winfield Pace inherited from Mary Christine Pace. It is not claimed that Bob Winfield Pace was incompetent. With respect to the interest said minor petitioners claim by inheritance from Mary Christine Pace, the Supreme Court of Arkansas has held, since at least as early as 1885, that minors cannot attach their disability of minority to the disability of their ancestors to prevent the bar of the statutes of limitation. *Dowell* v. *Tucker*, 45 Ark. 438; *Millington* v. *Hill*, 47 Ark.

301, 1 S. W. 547; *Reed* v. *Money,* 115 Ark. 1, 170 S. W. 478; *Hoggard* v. *Mitchell,* 164 Ark. 296, 261 S. W. 643. And with respect to the interest said petitioners claim by inheritance from Bob Winfield Pace, he not being under disability, the statutes of limitation commenced to run against him and it continued to run against said petitioners, despite their minority. *Bender* v. *Bean,* 52 Ark. 132, 12 S. W. 180, and *Bratton, et al.,* v. *Union Saw Mill Co.,* 168 Ark. 637, 271 S. W. 32.

Petitioners' contention herein that the refusal of the Supreme Court of Arkansas "to determine the status of the claim" of the aforesaid minor petitioners deprived them of their property without due process of law is without substance. The Supreme Court of Arkansas was not under any constitutional or statutory duty to write any opinion herein, much less to include in its opinion any discussion of any claim which might have been made by said minor petitioners that they were not barred by the statutes of limitation because of their minority. *Scott* v. *State,* 49 Ark. 156, 4 S. W. 750. Petitioners point to no authority in support of their instant contention and we are confident that none can be found.

Finally, despite the fact that the Chancery Court held herein that petitioners suffered nonsuits in their actions in the federal court on August 8, 1945, and that petitioners, including the aforesaid minor petitioners, were barred by the statutes of limitation, the record herein does not show that petitioners claimed that said holding presented any federal question or that they were denied any constituional rights by its judgment. (R. 62-67) If the opinion of the Arkansas Supreme Court herein presents any federal questions, obviously, the same questions were presented by the judgment of the Chancery Court herein. This Court will

not review the decision of a state Supreme Court when federal questions in a case are raised for the first time upon petition for rehearing to the state Supreme Court. *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114, 67 L. ed. 556; *Godchaux Co.* v. *Estopinal*, 251 U. S. 179, 64 L. ed. 213; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 77 L. ed. 231 and *McGarrity* v. *Bridge Comm.*, 292 U. S. 19, 78 L. ed. 1095.

Conclusion.

In final analysis, in the case at bar the Supreme Court of Arkansas merely construed and applied the Arkansas statutes of limitation, and, such being the case, its decision is not subject to review by this Court.

Respectfully submitted,

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